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4 WILLIAM JOHN GEARY,
5 Plaintiff,
6 v.
7 PAREXEL INTERNATIONAL
8 CORPORATION,
9 Defendant.

10 Case No. 5:19-cv-07322 EJD
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**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS PLAINTIFF'S
SECOND AMENDED COMPLAINT
WITH LEAVE TO AMEND**

13 Re: ECF No. 140
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Before the Court is Defendant's Motion to Dismiss Plaintiff's Second Amended Complaint. Defendants' Not. of Mot. and Mot. to Dismiss Plf.'s Second Am. Compl. ("Mot."), ECF No. 140. The Court finds the motion appropriate for decision without oral argument pursuant to Civil Local Rule 7-1(b). For the reasons discussed below, the motion is **GRANTED with leave to amend**.

I. BACKGROUND

Plaintiff John Geary III ("Geary") appearing pro se filed his Second Amended Complaint ("SAC") on May 20, 2022, alleging a sole remaining claim for relief against all defendants for retaliation in violation of Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank" or the "Act"), 15 U.S.C. § 78U-6. *See generally* SAC, ECF No. 139. The Court granted Defendant Parexel International Corporation's ("Parexel") motion to dismiss the original complaint with limited leave to amend only the Dodd-Frank claim and dismissed with prejudice Geary's Sarbanes-Oxley claim, both wrongful termination claims in violation of California Labor Code § 1102.5 and common law wrongful termination in violation of public policy, and dismissed the Dodd-Frank claim as to the individual defendants. *See* Order Granting Mot. to Dismiss with Leave to Am. ("Order"), ECF No. 133.

1 The SAC alleges that Geary was employed by Parexel, a clinical research service company,
2 as a Senior Project Manager in 2014 and worked from his home in San Jose. SAC ¶¶ 6, 10–11.
3 According to Geary, in this role he calculated and reported accrual of recognized revenue and
4 attested to its accuracy. *Id.* ¶ 9. He alleges that on April 8, 2015, during his employment, he
5 reported wire fraud and investor fraud claims to “the corporate hierarchy,” and in May 2015, he
6 reported his observations to the U.S. Securities and Exchange Commission (“SEC”). *Id.* ¶¶ 1, 20,
7 38. Geary’s employment with Parexel was terminated on June 30, 2015. *Id.* ¶¶ 2, 38. He alleges
8 that he was terminated “after months of personal abuse” because he “refused to be complicit in the
9 wrongdoing.” *Id.* ¶¶ 2, 22. He alleges that the company attempted to prevent him from
10 whistleblowing. *Id.* ¶¶ 2, 38. He further alleges that his protected activity was the contributing
11 factor and/or the reason for his termination. *Id.* ¶ 48. As a result, he claims that he has suffered
12 harm in the form of loss of wages, lost benefits, and additional monies he would have received if
13 he had not been subjected to said treatment, in addition to suffering humiliation, mental anguish,
14 and emotional and physical distress. *Id.* ¶ 49.

15 Defendant Parexel moved for dismissal under 12(b)(6) of Geary’s remaining Dodd-Frank
16 claim for failure to allege facts upon which relief may be granted. *See Mot.* Three weeks later, on
17 June 24, 2022, Parexel filed notice of Plaintiff’s non-opposition to the motion to dismiss. ECF No.
18 141. However, on July 13, 2022, Geary filed an administrative motion to retroactively extend the
19 deadline for filing his response brief due to his chronic critical illness and recent surgery. ECF No.
20 142. Finding good cause, the Court granted Geary’s request and accepted his brief in opposition.
21 *See ECF No. 142-1.* Parexel filed a brief in reply. *Reply ISO Def.’s Mot. to Dismiss Pl.’s Second*
22 *Am. Compl. (“Reply”), ECF No. 144.*

23 **II. LEGAL STANDARD**

24 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with enough
25 specificity to “give the defendant fair notice of what the . . . claim is and the grounds upon which
26 it rests.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted). A
27 complaint which falls short of the Rule 8(a) standard may therefore be dismissed if it fails to state
28 a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6)

1 is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support
2 a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th
3 Cir. 2008). When deciding whether to grant a motion to dismiss, the Court must accept as true all
4 “well pleaded factual allegations” and determine whether the allegations “plausibly give rise to an
5 entitlement to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court must also construe
6 the alleged facts in the light most favorable to the plaintiff. *Love v. United States*, 915 F.2d 1242,
7 1245 (9th Cir. 1989). While a complaint need not contain detailed factual allegations, it “must
8 contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its
9 face.’” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570).

10 A court generally may not consider any material beyond the pleadings when ruling on a
11 Rule 12(b)(6) motion. If matters outside the pleadings are considered, “the motion must be treated
12 as one for summary judgment under Rule 56.” Fed. R. Civ. P. 12(d). However, documents
13 appended to the complaint, incorporated by reference in the complaint, or which properly are the
14 subject of judicial notice may be considered along with the complaint when deciding a Rule
15 12(b)(6) motion. *Khoja v. Orexigen Therapeutics*, 899 F.3d 988, 998 (9th Cir. 2018); *see also Hal*
16 *Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990).
17 Likewise, a court may consider matters that are “capable of accurate and ready determination by
18 resort to sources whose accuracy cannot reasonably be questioned.” *Roca v. Wells Fargo Bank*
19 *N.A.*, No. 15-cv-02147-KAW, 2016 WL 368153, at *3 (N.D. Cal. Feb. 1, 2016) (quoting Fed. R.
20 Evid. 201(b)).

21 III. DISCUSSION

22 A. Dodd-Frank Claim

23 Parexel moves to dismiss the SAC on the grounds that Geary’s sole claim for retaliation in
24 violation of Dodd-Frank insufficiently alleges that he qualifies as a “whistleblower” under the Act.

25 The Dodd-Frank Act authorizes a private right of action for violations of the Sarbanes-
26 Oxley Act, providing retaliation protection to employees who report violations of the securities
27 laws to the SEC. *Banko v. Apple Inc.*, 20 F. Supp. 3d 749, 755 (N.D. Cal. 2013); *see* 15 U.S.C.
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1 78u-6(h)(1). Dodd-Frank's anti-retaliation provision forbids an "employer" from retaliating
 2 against a whistleblower for:

3 providing information to the Commission" or "initiating, testifying in, or assisting
 4 in any investigation or judicial or administrative action of the Commission based
 5 upon or related to such information" and also for "making disclosures that are
 6 required or protected under the Sarbanes Oxley Act of 2002 (15 U.S.C. [§§] 7201 et
 seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title
 18, and any other law, rule, or regulation subject to the jurisdiction of the
 Commission.

7 *Id.* § 78u-6(h)(1)(A)(i)-(iii).

8 The Act defines a "whistleblower" as "any individual who provides, or 2 or more
 9 individuals acting jointly who provide, information relating to a violation of the securities laws to
 10 the [Securities and Exchange] Commission, in a manner established, by rule or regulation, by the
 11 Commission." 15 U.S.C. § 78u-6(a)(6). Accordingly, an employee must provide information
 12 concerning suspected securities-law violations to the SEC before the employee's termination to
 13 qualify as a "whistleblower" entitled to protection under § 78u-6(h). *Digital Realty Tr., Inc. v.*
 14 *Somers*, 138 S. Ct. 767, 778 (2018). Pursuant to the Commission's rules, there are three methods
 15 for reporting a whistleblower complaint to the SEC: "[t]he information must be provided to the
 16 SEC through its website or by mailing or faxing a specified form to the SEC Office of the
 17 Whistleblower." *Id.* at 775 (citing § 240.21F-9(a)(1)-(2)).

18 Geary alleges that he "report[ed] his observations to the Securities Exchange Commission
 19 (SEC) in May 2015." SAC ¶¶ 1, 36. Parexel argues that the SAC fails to allege sufficient facts
 20 demonstrating exactly when and how Geary provided this information to the SEC pursuant to the
 21 methods prescribed by Rule 21F-9.¹ Mot. at 3. Geary's opposition brief states that he reported the
 22 violations to the SEC using its "online reporting tool." ECF No. 142-1 at 2. The SAC, however,
 23 does not allege which method Geary used to report the suspected violations to the SEC. *Somers*,
 24 138 S. Ct. at 775; *see also Moniodes v. Autonomy Cap. (Jersey) LP*, No. 1:20-CV-5648-GHW,
 25 2021 WL 3605385, at *9 (S.D.N.Y. Aug. 11, 2021) (finding that plaintiff failed to allege he was a
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27 ¹ Parexel also contends that Geary does not allege who he communicated with at the SEC nor what
 28 response the SEC provided to his whistleblower complaint. Mot. at 3. Nothing in Rule 21F-9 or
Iqbal requires Geary to plead his Dodd-Frank claim with such specificity.

1 whistleblower under Dodd-Frank because the complaint alleged that plaintiff provided information
2 to the SEC by telephone rather than one of the Rule 21F-9 methods). Since the procedures set
3 forth in Rule 21F-9 are the only permissible methods of providing information to the SEC, it is
4 necessary that Geary includes this detail in his complaint to ensure he qualifies as a whistleblower
5 under Dodd-Frank.

6 Accordingly, the Court **GRANTS** Parexel's motion to dismiss Geary's SAC.

7 **B. Leave to Amend**

8 Geary does not request leave to amend but the Court nonetheless considers it. *Lopez v.*
9 *Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (holding that dismissal with leave to amend should be
10 granted even if no request to amend was made).

11 When dismissing a complaint for failure to state a claim, a court should grant leave to amend
12 "unless it determines that the pleading could not possibly be cured by the allegation of other facts."
13 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000). "Under the futility analysis, '[d]ismissal
14 without leave to amend is improper unless it is clear . . . that the complaint could not be saved by
15 any amendment.'" *Wills v. City of Monterey*, No. 21-CV-01998-EMC, 2022 WL 504159, at *2
16 (N.D. Cal. Feb. 18, 2022) (quoting *United States v. Corinthian Colleges*, 655 F.3d 984, 995 (9th
17 Cir. 2011)). Geary asserts that he has submitted an online whistleblower complaint to the SEC.
18 Therefore, it is possible that the deficiencies in the complaint can be cured.

19 Parexel asks this Court to dismiss the action with prejudice because Geary has already been
20 afforded several opportunities to amend. Mot. at 6. Geary responds that defendants could have
21 raised non-compliance with Dodd-Frank reporting procedures when it previously moved to dismiss
22 in order to avoid additional motion practice. ECF No. 142-1 at 2. However, Parexel notes that
23 Geary's initial complaint alleged that he reported his observations to the SEC in May 2018—three
24 years later than May 2015 as alleged in his SAC—which defendants moved to dismiss on the basis
25 that Geary failed to report the suspected violations before his termination in June 2015 pursuant to
26 15 U.S.C. § 78-u6(a)(6). Reply at 1, n.1; compare Compl., ECF No. 1 ¶¶ 1, 40 with SAC ¶¶ 1, 36.
27 As a result, defendants did not raise the instant issue in their prior motion.

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1 Because Geary was previously granted leave to amend on other grounds, and “[g]iven the
2 combination of Rule 15’s policy favoring amendments, [and] the leniency allotted to pro se
3 litigants,” the Court will afford Geary one final opportunity to amend. *Wills*, 2022 WL 504159, at
4 *2.

5 **C. Judicial Notice**

6 Alternatively, if the Court grants leave to amend, Parexel requests that the Court require
7 Geary to produce a copy of his whistleblower complaint that he allegedly reported to the SEC in
8 May 2015. *Id.* In doing so, Parexel asks the Court to take judicial notice of the SEC’s response
9 to counsel’s Freedom of Information Act (“FOIA”) request for any “reports or complaints
10 submitted by William John Geary III aka Bill Geary against Parexel International Corporation from
11 2015 to the present.” Reply Decl. of Timothy M. Hoppe ISO Defendant’s Mot. to Dismiss Pl.’s
12 Second Am. Compl. (“Hoppe Decl.”), ECF No. 144-1 ¶ 3; *see also* ECF No. 144-2.

13 As a general rule, “a district court may not consider any material beyond the pleadings in
14 ruling on a Rule 12(b)(6) motion.” *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001).
15 However, a court may properly consider materials outside the pleadings where (1) the matter is
16 subject to judicial notice, meaning the facts are not “subject to reasonable dispute,” Fed. R. Evid.
17 201(b), or (2) where the document is “incorporated by reference into a complaint if the plaintiff
18 refers extensively to the document or the document forms the basis of the plaintiff’s claim.” *United*
19 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Parexel does not ask the Court to convert the
20 motion into a motion for summary judgment under Fed. R. Civ. P 56.

21 “Unlike rule-established judicial notice, incorporation-by-reference is a judicially created
22 doctrine that treats certain documents as though they are part of the complaint itself.” *Khoja*, 899
23 F.3d at 1002. The incorporation by reference doctrine permits a district court to consider
24 “documents in situations where the complaint necessarily relies upon a document or the contents
25 of the document are alleged in a complaint, the document’s authenticity is not in question and there
26 are no disputed issues as to the document’s relevance.” *Coto Settlement v. Eisenberg*, 593 F.3d
27 1031, 1038 (9th Cir. 2010). “A court ‘may assume an incorporated document’s contents are true
28 for purposes of a motion to dismiss under Rule 12(b)(6).’” *Khoja*, 899 F.3d at 1003 (quoting

1 *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). Because the SAC alleges that Geary submitted
2 a whistleblower complaint with the SEC and it is a prerequisite to a Dodd Frank claim, Parexel
3 argues that the SEC filing has been incorporated by reference and asks the Court to consider the
4 SEC's response to Parexel's FOIA request at Exhibit A in evaluating the sufficiency of the
5 allegations. According to the SEC's FOIA response, Geary has not submitted a whistleblower
6 complaint against Parexel. Reply, Ex. A; *see also* Hoppe Decl. ¶¶ 4–6.

7 Here, the SAC does not refer to this document, nor are the contents of the document alleged
8 in the SAC. While the SAC alleges that Geary filed a whistleblower complaint with the SEC, “the
9 mere mention of the existence of a document is insufficient to incorporate the contents of a
10 document.” *Coto Settlement*, 593 F.3d at 1038.

11 Parexel does not ask the Court to take judicial notice of the SEC's FOIA response for the
12 purposes of dismissing the complaint. However, Parexel uses the contents of the SEC's FOIA
13 response to challenge the truth of Geary's factual allegations and asks the Court to impose a
14 condition of proof—production of the alleged whistleblower complaint—in granting leave to
15 amend to “ensure that Geary can satisfy an essential element of his claim.” Reply at 2. This is
16 improper on a 12(b)(6) motion to dismiss. The Ninth Circuit has cautioned against the practice of
17 using judicial notice or the incorporation by reference doctrine “improperly to defeat what would
18 otherwise constitute adequately stated claims at the pleading stage” and “to undermine the
19 complaint, and hopefully dismiss the case at an early stage.” *Khoja*, 899 F.3d at 998.

20 Even if the Court were to incorporate the SEC's FOIA response, the document does not
21 wholly foreclose the possibility that Geary submitted a whistleblower complaint with the SEC, i.e.,
22 if Geary had filed his whistleblower complaint under a different variation or spelling of his name
23 such that it would not appear in the SEC's search, or if a search or recordkeeping error occurred
24 during the SEC's FOIA investigation. This is an issue that will properly be determined at a later
25 stage in the proceedings, particularly where Geary is able to respond.

26 Parexel's request is therefore DENIED.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Parexel's motion to dismiss is **GRANTED** and Parexel's request
3 for judicial notice of the SEC's FOIA response is **DENIED**. The Court will afford plaintiff limited
4 leave to amend his complaint on or before **Monday, April 3, 2023**. Geary may not add new claims
5 or parties without leave of the Court or stipulation by the parties pursuant to Federal Rule of Civil
6 Procedure 15. Failure to timely amend and/or comply with these orders will result in dismissal
7 with prejudice pursuant to Federal Rule of Civil Procedure 41(b).

8 **IT IS SO ORDERED.**

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10 DATED: March 20, 2023



11 EDWARD J. DAVILA
12 United States District Judge